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RULES OF EVIDENCE—SUBSTANTIVE OR PROCEDURAL?

EDMUND M. MORGAN*

It hardly needs stating that the definition of a legal word or term depends upon the purpose for which it is to be defined. If in framing a generalization designed to state a rule or make a discrimination applicable in a specific topic or field of the law, the courts use specified terms, it by no means follows that they intend those terms to be understood in the same sense in generalizations dealing with problems in another topic or field. The words, substance or substantive and procedure or pcedural, have been used most frequently in three separate situations: (1) in dealing with controversies concerning the applicability in one territorial jurisdiction of the law of another territorial jurisdiction, (2) in determining the applicability in a federal court of the law of the state in which the federal court is sitting in a trial between citizens of different states, and (3) in determining the operative effect of a statute enacted after the happening of the event or creation of the condition which is the subject of the action. In all of them the solution is generally expressed in terms of procedure or substance. In none of them does the meaning given the term therein furnish a compelling answer to our question.

Consequently, whether a constitutional or statutory provision recognizes or confers or creates the power of a court to regulate procedure, its interpretation requires an elementary analysis of our system of litigation.

The court does not initiate litigation. It has no instrumentalities of its own for discovering the existence or tenor of a dispute between potential litigants, or for discovering and assembling the factual materials necessary or suitable for the resolution of such a dispute. It knows or is charged with knowledge of the content and applicability of every proposition of law pertinent to every dispute properly presented to it; but as to the truth of any of the potentially pertinent disputable propositions of fact, it knows nothing. It is the function

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of the parties to define the area of dispute and to present the materials for its resolution. The burdens or duties which the performance of this function entails, the court distributes between the parties. As to the area of dispute, it assigns to each party the burden of asserting the existence of a specified state of fact which would create or destroy pertinent legal relations between him and his opponent. As to resolution of the dispute, it allocates to one party or the other the burden of presenting materials of sufficient persuasive force to convince the trier of the truth of each proposition of fact upon which he is relying. These are the familiar burden of pleading and burden of proof. If a party fails to assert the existence of a specified state of fact as to which he has this burden of pleading, the court assumes that it does not exist. If a party fails to present the materials which convince the trier of the truth of a proposition which he has the burden of proving, the court assumes its falsity.

In such a system it seems too clear for debate that the rules which determine the legal relations between the parties when all the facts are known or assumed are rules of substance. All other rules have to do with the methods by which the machinery for the administration of justice is set in motion, the methods by which the limits of the controversy are defined and the materials for decision are to be presented and handled. They can hardly be said to do more than regulate the method of proceeding to secure a determination of substantive rights and duties. They are guides to judges and litigants for the use of the judicial machinery for finding facts and not mandates to the judges as to the legal effect of the findings which the proper operation of the machine will produce.

The rules of evidence are among these guides. Rules 43 and 44 of the Federal Rules of Civil Procedure and rules 26, 27 and 28 of the Rules of Criminal Procedure are framed upon this theory. Their adoption by the Supreme Court justifies the inference that at least a majority of all its members approved this theory. In explaining the scope of the Rules of Civil Procedure before the Institute held by the American Bar Association in Cleveland, Ohio, in July 1938, former Attorney-General William D. Mitchell, whose opinion in this field is entitled to great weight, said:

Next, there is the question of evidence. When the Committee first met, our first reaction was that dealing with the rules of evidence was not within the scope of the statute, and that the words 'pleading, practice and procedure' were not intended by Congress to provide for a revision of the evidence rules. That was our offhand impression. We changed that after we had given the matter further consideration, and were fortified by ample authority to the effect that rules of evidence are matters of procedure. . . .

There was a tremendous pressure brought on the Advisory Committee by

those familiar with the subject of evidence insisting that there was a need for reform, which we did not meet, and some day some other advisory committee should tackle the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court.¹

Does this conclusion fail to give due weight to judicially recognized classifications? The case in which it is most frequently declared that the decision turns upon the distinction between rules of substance and rules of procedure involves the choice between conflicting rules of law. Where an action between *P* and *D* is pending before a court of state *A* and all the operative facts occurred in state *B* or the situation is treated under the applicable rule of conflicts as if all the facts had occurred in state *B*, there is no question that the court of *A* will generally act as if it were a court of *B* in determining (1) whether those facts created an interest in *P* subject to legal protection against infringement by *D*, and (2) whether they constitute an infringement of such an interest by *D* that a court of *B* would furnish *P* a remedy against *D*. This is a cumbersome way of saying that the court of *A* will apply the law of *B* to determine whether *P* has a cause of action against *D*; that is, whether upon all the facts, as disclosed or assumed, *D* owes *P* a duty to make legal amends to *P*. That is a question of substantive law. It has nothing to do with the method by which such an action would be initiated in state *B* or the means by which the truth of the controverted propositions of fact would be made to appear to the courts of state *B*.

It goes without saying that *P* cannot ask state *A* to set up special machinery for the purpose of handling litigation imported from state *B* or a special method or means of stimulating *A*'s tribunals to act. He must use the machinery and method which *A* has provided and which it uses in litigation originating in *A*. The materials which the parties can be permitted to feed into *A*'s machine must be such as it can satisfactorily process. Experience with that machinery has convinced the courts of *A* that it can operate efficiently and turn out a satisfactory product by using specified kinds of raw materials and no others. For example, they may have found that *A*'s triers of fact either can or cannot be trusted to give proper weight to the testimony of witnesses who lack designated qualities or attributes, or to subject to proper discount lay opinion or certain classes of hearsay, or to evaluate oral evidence as to some kinds of transactions. Whether the courts of *B* have reached the same or different conclusions concerning the capabilities of *B*'s triers of fact is entirely immaterial. All these matters which have to do with the efficient operation of the

1. AMERICAN BAR ASSOCIATION, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND PROCEEDINGS OF THE INSTITUTE ON THE FEDERAL RULES 186 (Cleveland, Ohio 1938).

judicial machine to accomplish the purpose for which it was designed are matters of procedure and are governed by the rules of state *A*. All of the foregoing is strictly in accord with chapter 12 of the *Restatement of Conflict of Laws*, and the usually accepted generalization that the law of the locus contractus or delicti governs substance and the law of the forum governs procedure.

On the other hand, there is an underlying widely accepted consideration of policy which induces the court that deems it proper to accept the imported litigation to try to reach as far as practicable the same result as the courts of the state which created the cause of action would have reached. A litigant should not be able to secure for himself a greater benefit or force upon his opponent a heavier detriment by shopping for the most favorable available forum. Consequently, the court of *A* may find it wise and practicable to modify a rule of its procedure by applying a procedural rule which the courts of *B* would have applied in a situation where the application of *B*'s rule would be likely to produce a different result. This consideration has recently received constantly increasing emphasis. And in order that the long accepted generalization shall appear to "moult no feather," the courts of the forum are tending to declare to be rules of substance those rules of procedure of the locus which they think it expedient to apply. This tendency has been given great impetus by the United States Supreme Court in applying the rule of *Erie R.R. v. Tompkins*.² That case had nothing to do with any distinction between procedure and substance. It concerned only the applicability of the law of the state in a controversy between citizens of different states in a trial in a federal court. But the opinion of Mr. Justice Brandeis, because of its progeny, legitimate and illegitimate, requires analysis and classification to prevent misapplication of the decision and uncritical acceptance of the dictum in situations to which neither has any pertinence.

Article 3, section 2, of the Constitution of the United States provides: "The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . to controversies . . . between citizens of different states. . . ." Section 4 of the Judiciary Act of 1789³ established circuit courts, and section 11 conferred upon them original cognizance of "all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State." In 1875 the language was changed to conform

2. 304 U.S. 64 (1938). It may seem a waste of good white paper to add to the plethora of comment upon the *Erie* case, but an attempt to demonstrate its inapplicability to the situations which do not involve any problem of conflict of laws may possibly be pardoned.

3. See 28 U.S.C.A. § 1332 (1949), § 41 (Supp. 1956).

with that of the Constitution and to include for the first time controversies "arising under the Constitution or laws of the United States or treaties made or [which] shall be made under their authority."⁴ It seems clear then that for nearly a century Congress deemed of prime importance the right of a citizen of another state to have his controversy with a citizen of the forum state tried by a tribunal of the national government regardless of the subject of the action. There can be little or no doubt that during those years the controversies included federal questions as well as those of municipal law, or that the Court was considered, and was in fact, as much a national court when trying a non-federal issue as when trying one involving no such issue. Consequently the 34th section of the Act of 1789 was applicable in all litigation regardless of its subject matter.

That section provides "The Laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply."

Mr. Charles Warren⁵ has made it clear that this section was not included in the original draft bill but was inserted as a Senate amendment. The original text of the amendment read: "And be it further enacted that the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise except," etc. as in the enacted section. The words "Statute law" were crossed out and the word "Laws" substituted, and all the words between "several States" and "except" were deleted. Had this information been presented to the Court in 1842, it is probable, as Mr. Warren asserts, that the word "Laws" would not have been judicially construed as the equivalent of "statutes." It is likely that it would have been held to include the common law; but it does not follow that the decision in *Swift v. Tyson*⁶ would have been different. First, Mr. Warren does not contend that Congress had no power to deal with substantive rights and duties in situations involving citizens of different states. Second, the section contains no mandate to the United States courts as to the effect of decisions of a state tribunal purporting to determine the content of the common law. It cannot be seriously doubted that Mr. Justice Story was stating the theory, then and for a long time prior and subsequent thereto, accepted by common law judges and lawyers,⁷ when he declared:

4. See 28 U.S.C.A. § 1331 (1949).

5. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 85-88 (1923).

6. 41 U.S. (16 Pet.) 1 (1842).

7. See Mr. Justice Frankfurter's statements in *Guaranty Trust Co. v. York*, 326 U.S. 99, 101-03 (1945).

In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill founded, or otherwise incorrect.⁸

This is in no sense contrary to the argument of counsel, to which Mr. Warren refers,⁹ in *Sims v. Irvine*: "The 34th section of the judicial act [1 Stat. 92] adopts the laws of the several states, as rules of decision in trials at common law: Now, as in *England* the laws are defined to be general customs, local customs, and acts of Parliament (1 Bl. C. 63); so in *Pennsylvania*, the laws must be defined to be the common law, as modified by practice, and acts of the General Assembly."¹⁰

Under this theory, the question was the effect of the decisions of the state court as to the tenor of the common law upon the function of the federal circuit court to determine that tenor. There was in 1842 no contention that the circuit court had less authority than any other common law trial court to determine in the first instance the tenor of any non-statutory rule applicable to the controversy before it, that is to say, of the applicable common law rule, or that its ruling was open to either review or control by any court save the United States Supreme Court. The concept stated by Mr. Justice Bradley in 1883 seems to have been subject to no judicial doubt up to that time:

The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. . . . Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid and in most cases do avoid, any unseemly conflict with the well considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.¹¹

It was not until ten years later that Story's interpretation was judicially attacked as violating the United States Constitution. Mr. Justice Field, after insisting that Story's interpretation of the word

8. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

9. Warren, *supra* note 5, at 88 n.85.

10. 3 U.S. (3 Dall.) 425, 454-55 (1799).

11. *Burgess v. Seligman*, 107 U.S. 20, 33-34 (1883).

"laws" was too narrow and if applied to the same word in the fourteenth amendment would result in unequal protection of the law, contended that it made the statute an infringement of the tenth amendment. He declared that "There is no unwritten general or common law of the United States . . ." ¹² which controls a conflicting law of a state. To hold otherwise would be to violate the Constitution, ". . . which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments." ¹³

Mr. Justice Brewer, speaking for the majority of the Court in the *Baugh* case, repeated Mr. Justice Bradley's statement in the *Seligman* case, and pointed out that Congress had not amended the act in the fifty years in which this interpretation had been applied. In *Kuhn v. Fairmont Coal Co.*, ¹⁴ Mr. Justice Holmes, dissenting, first pointed out that the issue in that case was title to real estate and under the doctrine of *Swift v. Tyson* was to be resolved by the law of the state as declared by the state courts, and asserted that in *Gelpcke v. City of Dubuque* ¹⁵ the Court had recognized that a line of harmonious decisions applying a judicially made rule constituted the law of the state and would be given a prospective operation. He continued:

It is said that we must exercise our independent judgment—but as to what? Surely as to the law of the States. Whence does that law issue? Certainly not from us. But it does issue and has been recognized by this court as issuing from the state courts as well as from the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end. The law of a State does not become something outside of the state court and independent of it by being called the common law. Whatever it is called, it is the law as declared by the state judges and nothing else. ¹⁶

It may not be irreverent or entirely irrelevant to suggest that these pronouncements assume not merely the undesirability but the legal impossibility of the existence in a single territory of a system having two courts of coordinate jurisdiction with no common superior—a system the existence of which the Supreme Court had then explicitly recognized for nearly seventy years.

Mr. Justice Holmes stated his theory more fully in his dissent in the *Black & White Taxicab Co.* ¹⁷ case:

But the question is important and in my opinion the prevailing doc-

12. *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368, 394 (1893) (dissenting).

13. *Id.* at 401.

14. 215 U.S. 349, 370 (1910).

15. 68 U.S. (1 Wall.) 175 (1864).

16. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910).

17. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-35 (1928).

trine has been accepted upon a subtle fallacy that never has been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is. The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law. By that phrase is meant matters that are not governed by any law of the United States or by any statute of the State—matters that in States other than Louisiana are governed in most respects by what is called the common law. It is through this phrase that what I think the fallacy comes in.

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force. *Boquillas Cattle Co. v. Curtis*, 213 U.S. 339, 345. But a general adoption of it does not prevent the State Courts from refusing to follow the English decisions upon a matter where the local conditions are different. . . .

If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the Constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies, except when a citizen of another State is able to invoke an exceptional jurisdiction, that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described.

In the *Erie* case Mr. Justice Brandeis, speaking for the majority, accepted the view of Mr. Justice Holmes and declared section 34 of

the Act of 1789 constitutional but its previous interpretation unconstitutional.

To what extent is the Holmes theory invulnerable to attack? To what extent do judges "make the law," and is it true that their declarations as to what the law shall be are as effective as an enactment of the legislative department? When confronted with a controversy properly brought before it, the court is bound to resolve the dispute by a decision for one or the other of the litigants. It cannot refuse to do so simply because there is no applicable legislative enactment. When it has made its determination, the rule which was necessary for the decision of the right-duty relationship of the parties was the rule of law for those parties in that controversy. Assume that this rule was expressly stated by the court. It operated retroactively. If the court was a court of last resort, it might have decided either way, regardless of the manner in which it had previously decided. And the result is no different if we assume that the common law has a transcendental existence—a brooding omnipresence—which is to be discovered by the court of the territory over which it is hovering. When that court on its exploratory expedition discovers what it believes to be the law or that part of the law applicable to the controversy, that which is discovered will constitute the law between these parties for the solution of their dispute, and they may, if they wish, take comfort in the fact that such was always the law, rather than grieve over the assumption of powers by the court which no legislature could properly have exercised. Of course the truth is that under our common law adversary system, the courts have always made law retrospectively. Judicially-created law must be retrospective, for it is always applied to situations that occurred in the past.

To what extent is it prospective in the sense that legislative enactments affecting substantive rights and duties almost always must be? That answer is found in *Great Northern Ry. v. Sunburst Oil & Refining Co.*¹⁸ The Supreme Court of Montana had interpreted a Montana statute as giving the Board of Railroad Commissioners power to change prescribed rates if found to be unreasonable and as entitling a shipper, after complying with stated conditions, to recover amounts paid under the original rate in excess of those fixed in the changed rate. In the case at bar the shipper-plaintiff had so complied and recovered judgment for excess charges made under a changed rate. On appeal the Court stated that its prior rulings had been erroneous, that the statute properly interpreted did not operate to make the changed rate retroactive, that the mistaken interpretation to the contrary governed the present controversy, but that it would not be

18. 287 U.S. 358 (1932).

applied to future transactions. In affirming the judgment Mr. Justice Cardozo, speaking for a unanimous court, said:

This is not a case where a court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby made invalid what was valid in the doing. Even that may often be done, though litigants not infrequently have argued to the contrary. [Citing cases]. This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal.

We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are decisions intimating too broadly . . . that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. [Citing *Gelpcke v. Dubuque*, and numerous other cases]. On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. [Citing cases]. The alternative is the same whether the subject of the new decision is common law or statute. [Citing cases]. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. . . . The common law [of Montana] as administered by her judges ascribes to the decisions of her highest court the power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the Courts of Montana, we are not at liberty, for anything contained in the Constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.¹⁹

It would be difficult to find a clearer statement of the effect of judicial law making concerning past transactions and of the essence of the doctrine of stare decisis. Both are in strict accord with the theory of Mr. Justice Holmes, as stated by him. As to past transactions: "Judicial decisions have had retrospective operation for near a thousand years."²⁰ As to future controversies: "Law is a statement of the circumstances in which the public force will be brought to bear

19. *Id.* at 364-66.

20. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (dissenting).

upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts."²¹ It is too obvious for debate that a court is at liberty to refuse to follow precedent whenever it deems it wise to do so. The rules laid down in the decisions of the highest court can be no more than the basis for a prediction that they *will be* treated as a statute *must be* treated. Hence it cannot be said that what the court has treated and applied as the common law today will necessarily be applied as common law to controversies before it tomorrow. If the court is to be regarded as the source of the law, it can be so only in the sense that it has in any decided case stated as law the rule which it has therein applied and has also said that, as then advised, it intends to apply the same rule in the future. It is doubtless the source and creator of the law therein applied retrospectively, but as to law to be applied in the future, it has furnished only the basis for a prediction.

In June 1940 in the *Gobitis* case,²² the United States Supreme Court held it to be no violation of the constitutional guaranty of religious freedom to require a salute to the flag as a condition of the right to attend a state public school. In October, 1942, a United States District Court held the contrary and in June, 1943, the Supreme Court affirmed this decision of the district court.²³ If the *Gobitis* decision was the law until 1943, how could it have failed to be law in October 1942? Speaking loosely, it may be permissible to say that the court has made the law for transactions subsequent to the date of its decision; speaking accurately, it may properly be said that, in the absence of a contrary controlling statute, it will in the future make the law in future controversies; but it cannot be accurately said that it has legislated or can legislate for the future or has performed a legislative function in making its decisions.

There is no room for doubt that for the purpose of application in any controversy properly brought before it, the United States Supreme Court is the final authority as to the interpretation of every provision of the Constitution and of Acts of Congress. From 1842 until 1938 it interpreted the constitutional grant of jurisdiction and section 34 of the Judiciary Act as giving the United States court co-ordinate jurisdiction with the state court and authority in diversity cases to determine the content of the common law of the forum state. It cannot be said that during this period the Constitution and the Act of Congress conferred no such jurisdiction or authority without saying that a decision of the United States Supreme Court construing a constitutional provision can be and was itself unconstitutional. And this is certainly

21. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-57 (1909).

22. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

23. *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943).

no time for the Court to regard such a proposition as even debatable. To do so would be to accept the very theory which the *Erie* decision repudiated. It would be conceding that the real meaning of those constitutional and statutory provisions is a brooding omnipresence which is and always has been hovering over all the territory of the United States but which escaped discovery by the judges for nearly a century.

Whatever the theory of *Erie* may be, it was not applied or said to be applicable to anything except rules governing substantive legal relations. And in this connection it is pertinent to remember that prior to *Erie* the Court in its interpretation of section 34 had never made a distinction between procedure and substance as such. In *Steamboat Co. v. Chase*,²⁴ the Court explained that in certain cases a litigant had an option to proceed in admiralty or in a common law court and stated the following as a familiar principle:

State legislatures may regulate the practice, proceedings, and rules of evidence in their own courts, and those rules, under the 34th section of the Judiciary Act, become, in suits at common law, the rules of decision, where they apply, in the Circuit Courts.²⁵

In *Potter v. National Bank*²⁶ the Court refused to apply the state law as to the incompetency of an interested survivor only because the existing statutes of the United States did "otherwise provide," so that the excepting clause of the 34th section was applicable. Four years later the Court held applicable a statute of the forum state making communications between patient and physician privileged.²⁷ It pointed out that the 34th section had been uniformly construed as including state rules of evidence, and that there was no applicable statute of the United States covering the subject. The passage of the Conformity Act of 1872, which provided that the practice, pleadings, and forms and modes of proceeding in causes, other than equity and admiralty causes, should conform *as near as may be* to those in the state courts, made no change in this respect, except perhaps to enlarge the discretionary powers of the United States courts.

The *Erie* opinion was rendered in April 1938. The Federal Rules of Civil Procedure had then been approved by the Supreme Court and had been transmitted to Congress. They became effective in September 1938, and "thereafter," as the enabling act provided, "all laws in conflict therewith shall be of no further force or effect." During the next six years the *Erie* decision was cited by the Court in numerous decisions involving unquestioned substantive rights. In no case was

24. 83 U.S. (16 Wall.) 522 (1873).

25. *Id.* at 534.

26. 102 U.S. 163 (1880).

27. *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U.S. 250 (1884).

its pertinence to state rules of procedure raised or discussed until 1945. Prior to that time in *Sibbach v. Wilson & Co.*²⁸ the minority of the Court, speaking through Mr. Justice Frankfurter, had insisted that rule 35 authorizing the Court to order a physical examination of a party to the action was not within the authority conferred by the enabling act, because the *Botsford*²⁹ case had held that in the absence of statute a federal court had no power to make such an order:

So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts.

. . . . Plainly the Rules are not acts of Congress and cannot be treated as such.³⁰

The majority repudiated both these propositions:

The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. . . .

Evidently the Congress felt the rule was written within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. . . . We conclude that the rules under attack are within the authority granted.³¹

In 1945 the *York*³² case raised the question whether in an equity action in which the jurisdiction of the federal court depended upon diversity of citizenship the statute of limitations of the state was controlling. Mr. Justice Frankfurter, speaking for the majority, pointed out that in many decisions such a statute was deemed procedural because dealing only with the remedy, and declared:

The question is whether such a statute concerns merely the manner and means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling upon the same claim by the same parties in a State court?

. . . . It [the *Erie* decision] expressed a policy that touches vitally the proper distribution of judicial power between State and federal Courts. . . . The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for

28. 312 U.S. 1 (1941).

29. *Union Pac. Ry. v. Botsford*, 141 U.S. 250 (1891).

30. 312 U.S. at 18.

31. *Id.* at 14-16.

32. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.³³

It will be noted that this decision did not strike down any express rule of civil procedure. But in *Ragan v. Merchants Transfer and Warehouse Co.*,³⁴ the Court, with only Mr. Justice Rutledge dissenting, held that rule 3 providing that an action is commenced by filing a complaint with the court could not be applied to toll the Kansas statute of limitations which required service of summons to begin an action. And in *Cohen v. Beneficial Industrial Loan Corp.*,³⁵ the majority held a New Jersey statute requiring a bond of indemnity for costs and expenses in a derivative action must be applied although rule 23 expressly deals with the subject and imposes a different condition. This was too much even for Mr. Justice Frankfurter, who in the *York* case had declared that in diversity cases a federal court adjudicating a state-created right "is for that purpose, in effect, only another court of the State. . . ."³⁶

If these decisions mean that section 34 is still controlling with reference to procedural rules, they totally disregard the excepting clause. If they mean that a proper interpretation of the constitutional provision and section 34 of the Judicial Code and the Act authorizing the Court to make rules of procedure, taken together, make the state law apply to any rule which is "outcome determinative," they may possibly mean that Congress has no power to prescribe for a court created by it a procedural regulation which has a determinative effect upon the outcome of an action for the enforcement of a state-created right, whatever its power may be with reference to other subject matter—a truly startling proposition which has never been squarely asserted, adequately argued, or expressly decided.³⁷ To be sure, they may mean only that in the absence of express legislative direction to the contrary, the Court deems it good policy to interpret the enabling act as authorizing the Court to promulgate rules having the effect not of law but as mere procedural regulations of matters of no appreciable importance upon the result of the litigation. If so, they have destroyed the usefulness, at least in the federal courts, of the most practicable and effective plan for procedural reform that has yet been devised. And it may be questioned whether it was necessary for the

33. *Id.* at 109.

34. 337 U.S. 530 (1949).

35. 337 U.S. 541 (1949).

36. 326 U.S. at 108. If this is true it puts every federal judge, including the Justices of the Supreme Court, upon the same level as a state judge of a municipal court; and it is high time to abolish jurisdiction based only upon diversity of citizenship.

37. See Stayton, *An Easement to Decision: A Servitude upon Judicial Legislation*, 35 TEXAS L. REV. 20, 51-58 (1956), for an analysis of *Erie* which supports this conclusion.

Court to pay so high a price to provide a remedy against the repetition of the injustices and discriminations caused by its *pre-Erie* extensions of the scope of the *Swift v. Tyson* decision, especially when applied in connection with its own ill-conceived fiction of corporate citizenship. But whatever the meaning or implication, it has no application to the problem of determining the distribution of legislative and judicial powers in the government of a single state or other entirely independent territorial unit of government.

The situation in which there is no question as to the applicability of the domestic law without reference to that of any other jurisdiction and in which procedural rules always have an important impact upon the result of litigation is that in which the issue is the applicability of legislation to controversies which arise before its enactment. The United States Constitution prohibits *ex post facto* laws in criminal prosecutions and the deprivation of property without due process of law in civil actions. In construing these provisions it is hornbook learning that no person has a vested right in a rule of procedure, including evidence. In *Calder v. Bull*,³⁸ Mr. Justice Chase did not recognize this generalization and in a dictum, classified as a prohibited *ex post facto* law "every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." But this dictum has been repudiated in later cases except in so far as it concerns the sufficiency of the evidence to justify a conviction. In *Hopt v. Utah*,³⁹ the court held applicable at a trial for murder a statute enacted after the offense making competent as a witness a person theretofore incompetent because a convicted felon. Speaking for the court, Mr. Justice Harlan said:

But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure.⁴⁰

*Thompson v. Missouri*⁴¹ presented a like problem concerning competency of evidence. The Supreme Court of Missouri on appeal from a judgment of conviction for murder by poison had ordered a new trial on the ground that the trial judge had admitted specimens of accused's handwritings solely as bases for comparison with the

38. 3 U.S. (3 Dall.) 386, 390 (1798).

39. 110 U.S. 574 (1884).

40. *Id.* at 590.

41. 171 U.S. 380 (1898).

disputed signature on a prescription for poison. Before the second trial a statute was enacted making admissible specimens of handwriting proved to the satisfaction of the judge to be genuine. At the second trial the specimens were again admitted and the defendant again convicted. Judgment of conviction, upheld on appeal by the Supreme Court of Missouri, was affirmed by the Supreme Court of the United States. In *Beazell v. Ohio*,⁴² Mr. Justice Stone, writing for a unanimous court, held valid the retrospective application of a statute requiring a joint trial of defendants jointly indicted. He cited with approval the foregoing decisions, and others which had enforced the same rule with reference to statutes which respectively (a) changed the place of trial, (b) abolished an existing court for hearing criminal appeals and created a new one, (c) empowered the state to appeal from an order granting the accused a new trial and (d) changed the qualifications for service on grand juries and on petit juries.

The Supreme Court of Alabama,⁴³ acting on the same principle, held that husband and wife were competent witnesses although the statute which made them so had been enacted after the commission of the offense charged. The Court of Appeals of California made a similar ruling as to a constitutional amendment which permitted the judge to comment upon the weight of the evidence and credibility of the witnesses,⁴⁴ and the Supreme Court of Colorado held that a rule of court so providing was properly given retroactive operation.⁴⁵

Obviously all ex post facto laws are retroactive, but not all retroactive laws are ex post facto, as the courts have defined this latter phrase. And it follows that in civil cases retroactive procedural regulations do not on that account violate the due process clause. Thus in *Reitler v. Harris*,⁴⁶ the Supreme Court held that a statute had been properly applied retrospectively in a proceeding to forfeit a sale of school lands on account of the buyer's breach of certain provisions of the contract of sale. The statute made an entry of forfeiture in the County Clerk's records of school land sales prima facie evidence that all the required procedure had been followed, including notice to the buyer. Mr. Justice Van Devanter said "That such a statute does not offend against either the contract clause or the due process of law clause of the Constitution . . . is now well settled."⁴⁷ That the courts of the several states recognize the same doctrine is

42. 269 U.S. 167 (1925). See also *Marion v. State*, 20 Neb. 233, 29 N.W. 911 (1886), holding retrospective a statute making the judge rather than the jury the judge of the law in criminal prosecutions.

43. *Wester v. State*, 142 Ala. 56, 38 So. 1010 (1905).

44. *People v. Talkington*, 8 Cal. App. 2d 75, 47 P.2d 368 (1935).

45. *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931).

46. 223 U.S. 437, (1912).

47. *Id.* at 442.

illustrated by the opinion in *Sackheim v. Pigueron*,⁴⁸ where the Court of Appeals of New York held retrospective a statute allocating the burden of proving contributory negligence to the defendant, although at the time of the injury the common law rule, which required plaintiff to prove due care, had uniformly been applied. The court deemed the principle so commonly accepted as to require citation only to standard generalizations.

Cases in this field, it is submitted, are of high relevance where the purpose of the discrimination is the distribution of function between the legislature and the judiciary. It is axiomatic that there is and can be no bright line between these two departments of government. And it is now clearly recognized that regulation of procedure may be assigned to either. Consequently when a constitutional or statutory provision assigns the regulation of procedure to the judiciary, no constitutional objection can be raised in situations where court-made rules do not interfere with vested rights in civil cases or violate the prohibition against ex post facto laws or some other specific mandate such as that prohibiting compulsory self-incrimination. It is definitely settled by judicial authority that regulations making competent witnesses theretofore incompetent are procedural; the same is true as to provisions making admissible relevant evidence theretofore excludable on objection of the adverse parties. The only limits are those upon regulations which would give to a fact when proved a value which would make it, in and of itself, a basis for a purely speculative or totally unreasonable deduction.

When legislatures draft codes of procedure, they frequently, if not usually, include rules governing not only the competency but also the privileges of witnesses, and when they include any regulations as to evidence, as they often do, they make provision for the use of privileged communications. This warrants the conclusion that when a legislature purports to delegate or does delegate to the courts the function of regulating procedure, it intends to include the subject of privileges and privileged communications. And the same should be true when the supreme law-making body, the people in adopting a constitution, uses the same language. In view of the host of current decisions upholding the delegation of legislative functions to various administrative tribunals, it would be difficult indeed to frame a serious argument that the judiciary is not the group with the qualifications most suited to determine what regulations are needed for the process of administering justice. The so-called common law privileges of witnesses were created by judicial decision; they have been modified by judicial decision, and in the absence of statute, can be disregarded or abolished by judicial decision. They are

48. 215 N.Y. 62, 109 N.E. 109 (1915).

nothing more or less than privileges to suppress the truth, and no officers of any department of government, other than the judiciary, have the constant opportunity to observe them in operation and the skill to determine how far and in what respects they interfere with the orderly and effective administration of justice.

It is therefore submitted that in the construction of a constitutional or statutory provision recognizing or conferring upon the courts the function of regulating procedure, the analysis with which this essay begins is pertinent, is in accord with the understanding of judges and legislatures when considering the distribution of governmental powers or functions, and is not affected by factors applicable to the problem of conflicts of laws between several states or independent governments or between the federal government and a state government. It follows that such a provision should be interpreted as vesting in the courts the power to make rules of evidence, including those governing competency and privilege of witnesses and privileged communications.